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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 95

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, PETITIONER,

v.

SARAH ELIZABETH STRINGFELLOW, A WIDOW, AND AS ADMINISTRATRIX, ETC., RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is reported in 64 Fed. (2d) 173 (R. 93-98).

Jurisdiction.

Petitioner seeks a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, under the provisions of Sec. 240 (*a*) of the judicial code, as amended by Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347 (*a*).

Respondent contends that inasmuch as the district court refused to allow the issues to be submitted to a jury and

directed a verdict for petitioner (R. 90) and entered judgment accordingly (R. 46-48), the action of the Circuit Court of Appeals in remanding the case to the district court "for further proceedings not inconsistent with the opinion" of the court (R. 104), which held the question of negligence "should have been submitted to the jury" (R. 96), does not present such a case as to call for review by this Court. Neither the petition nor brief show any reason why a review on certiorari should be granted to review a judgment which is not final.

Statement of the Case.

Petitioner in its statement, pages 6 to 12, has given some excerpts from the record, and disputes with the Circuit Court of Appeals upon its determination as to the facts, and since it appears to respondent that the petition does not give "A concise statement of the case containing all that is material to the consideration of the question presented, with appropriate page references to the printed record," the respondent takes the liberty of submitting a narration of the facts, which she deems essential to a ready and adequate understanding of the points sought to be brought before the Court.

Respondent in her own right as widow and as administratrix, on May 25, 1931, brought five separate actions in the District Court of the United States for the Southern District of Florida, Tampa Division (R. 28, 11, 19, 2, 36), against the petitioner for negligently running its train upon and fatally injuring her husband and two minor children at a street crossing in the City of Dunedin, Florida. A satisfactory statement of facts is found in the opinion of the Circuit Court of Appeals (R. 93-95), which we quote, but to which we have added in parentheses the record page references of the facts thus recited:

"The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland Street intersects the railroad right-of-way at right angles, the street extending east and west and the right-of-way north and south (R. 56). On the right-of-way the main line was flanked on either side by a sidetrack (R. 63). To the south of the crossing the main line was straight for a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west sidetrack, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed (R. 61, 86, and photographs). At the time of the accident appellant's husband was driving his automobile, in which his children, one seven and the other nine years of age, were riding with him, toward the east across the intersection; and the train was coming from the south. The train was a few minutes late (R. 60, 67), and was not due to stop at Dunedin (R. 85). A strong wind from the northwest interfered with the hearing of anyone at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell (R. 60, 74). The evidence was in hopeless conflict as to whether the whistle was sounded or the bell was rung, and also as to the speed of the train. Several witnesses for appellant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour (R. 57, 59, 60, 61, 63, 88). Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they had made, while travelling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were (R. 56, 59). On the other hand, witnesses for appellee, particularly the engineer (R. 65), fireman (R. 68) and members of the train crew (R. 82, 85), testified that as the train approached Scotland Street the last of four blasts of the whistle was sounded, and

that the bell was being rung by an automatic bell ringer from the time the train reached the fourth street south of Scotland Street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland Street. The fireman (R. 68) testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer who immediately put on the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as possible. The engine proceeded about 100 yards north of Scotland Street before it was brought to a standstill (R. 62). Several witnesses for appellee testified that appellant's husband drove across the intersection at a speed of 10 or 15 miles per hour (R. 68, 80); but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

By direction of the district judge the cases were consolidated for trial (R. 54).

Negligence of the railroad company was alleged in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine and in running the train upon the street crossing at a dangerous rate of speed (R. 2, 11, 19, 28, 36). The railroad company pleaded not guilty (R. 10, 19, 27, 35, 44).

In each case separate verdicts (R. 45, 46) and judgments were entered (R. 46, 48) and separate appeals were taken (R. 51) but on a single transcript and were docketed in the Circuit Court of Appeals as one case, argued as one case and were disposed of by a single written opinion. The judgments appealed from were reversed on March 31, 1933, as to all actions, *except* the one brought by respondent in her own right as widow for the death of her husband (R. 104), which was affirmed, in which case the Circuit Court

of Appeals entered an order granting respondent's motion for a *Severance* (R. 115) from all of her co-appellants for the purpose of filing a petition in this Court for a writ of certiorari.

Statute Inolved.

The statute of the State of Florida, which petitioner refers to on page 8 of its petition as No. 7052, Compiled General Laws of Florida, 1927, is as follows:

> "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

ARGUMENT.

The respondent first insists that the petition does not present such a case as to call for a review under Sec. 240(*a*) of the judicial code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347(*a*), which provides for a writ of certiorari and "*that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.*"

So far as respondent is advised, the court has not yet construed this section to authorize a writ of certiorari to review a judgment not final, although prior to the amendment, it was well settled that a judgment not final was insufficient to invoke the jurisdiction of the court.

George A. Fuller Co. v. *Otis Elevator Co.*, 245 U. S. 489, 38 Sup. Ct. Rep. 180.

Chicago & N. W. R. Co. v. *Osborne*, 146 U. S. 354, 13 Sup. Ct. Rep. 281.

Neither the petition nor the brief show any reason why a review on certiorari should be granted to review a judgment not final.

Neither does it appear that there are special and important reasons therefor, nor does the existence of any reasons for a review under rule 38, paragraph 5, appear in the petition or brief.

Questions Presented.

Point I.

"THE TRIAL COURT PROPERLY DIRECTED VERDICTS IN EACH OF THESE CASES, BECAUSE, AS FOUND BY THE DISTRICT COURT AND CONCURRED IN BY THE CIRCUIT COURT OF APPEALS, THE SOLE PROXIMATE CAUSE OF THE ACCIDENT RESULTING IN THE DEATH OF ALL THE PARTIES WAS THE NEGLIGENCE OF ONE OF THEM, TO WIT, THE DRIVER." (Petitioner's brief, page 22.)

Respondent is unable to find in the opinion of the circuit court any warrant for the question here presented, that the father's negligence was the sole proximate cause of the accident; but on the other hand, the court very clearly held that the evidence did not establish as a matter of law, that the father's negligence was the sole proximate cause of their (the children's) death (R. 96).

The circuit court held (R. 96):

> "There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could

not be stopped within less than 100 yards; especially if because of a strong headwind it was made difficult for those using the street intersection to hear a train approaching from the south."

In other words, the court held (R. 96):

"the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company";

and held further, that the evidence did not establish as a matter of law, that

"the father's negligence was the sole proximate cause of their deaths" (R. 96).

The court held further that

"The children were guilty of no negligence; and their father's negligence could not be imputed to them" (R. 96).

That

"it was open for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing" (R. 97).

And further cited with approval, the rule laid down by the Supreme Court of Florida in *S. A. L. Ry. Co.* v. *Watson*, 94 Fla. 571, 113 So. 716:

"There may be concurrent causes of a single injury —concurrent negligence of two separate and distinct agencies—which, operating contemporaneously, together constituted the efficient proximate cause of the injury inflicted, and without either one of which the harm would not have been done" (R. 97).

And the court concluded (R. 98):

> "Our conclusion is that the jury would have been warranted by the evidence in finding that appellee was liable in damages to appellant for the deaths of her children."

At most, petitioner presents under this subject, controverted facts, which have been directed by the Circuit Court of Appeals to be submitted to a jury for final determination. No jury has ever passed upon the facts and the judgment sought to be reviewed, merely sends the case back for submission to a jury upon evidence which the Circuit Court of Appeals found to be

> "in hopeless conflict as to whether the whistle was sounded or the bell was rung, and also as to the speed of the train" (R. 94).

Respondent submits that in a case where the evidence is conflicting on the question of negligence *vel non*, the remanding of the issues to a jury, does not present such a case as to call for a review by this Court on certiorari. Neither does it appear that the decision sought to be reviewed will have any bearing on any other case that might arise.

Point II.

> "THE TRIAL COURT PROPERLY DIRECTED A VERDICT IN EACH OF THESE CAUSES BECAUSE THE RESPONDENT FAILED TO PROVE ANY ACT OF NEGLIGENCE ON THE PART OF THE DEFENDANT AS THE PROXIMATE CAUSE OF THE ACCIDENT; ON THE CONTRARY, ALL OF THE EVIDENCE SHOWS CONCLUSIVELY THAT THE PROXIMATE CAUSE THEREOF WAS THE NEGLIGENCE OF THE DRIVER OF THE VEHICLE." (Petitioner's brief, page 24.)

Under this subject the Petitioner takes issue with the finding of facts by the Circuit Court of Appeals, and says:

> "the Circuit Court of Appeals was led into this error by a supposititious finding of facts not borne out by the record" (Brief p. 25).

Without going into a discussion of facts, we direct the court's attention to the fact that the Circuit Court of Appeals (R. 96) held:

> "The jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company."

Respondent submits that the question of *proximate cause* is primarily a question of fact; and upon an appeal from a directed verdict, the evidence must be given all reasonable inferences to be deducted therefrom in the light most favorable to respondent.

The record and the opinion of the Circuit Court of Appeals disclose that respondent introduced evidence, which, if believed by the jury to be true, would have established negligence upon the part of petitioner. The court said (R. 98):

> "Our conclusion is that the jury would have been warranted by the evidence in finding that appellee was liable in damages to appellant for the death of her children."

Respondent contends that this assignment only presents the question of whether the evidence introduced upon the trial was sufficient to establish negligence on the part of Petitioner; *primarily a question of fact.* Respondent also respectfully submits that a petition for a writ of certiorari, for the reason cited under this assignment, is contrary to the well established rule of this Court. That the Court will not consider questions of fact on certiorari has been frequently stated:

Southern Power Co. v. *North Carolina Public Service Co.*, (1923), 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413;
United States v. *Johnston*, (1925) 288 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925;
Federal Trade Commission v. *American Tobacco Co.*, (1927) 274 U. S. 543, 47 S. Ct. 663, 71 L. Ed. 1193;
Charleston S. C. Mining & Mfg. Co. v. *United States*, (1927) 273 U. S. 220, 47 S. Ct. 349, 71 L. Ed. 618, and cases cited therein.

Neither does the Petition disclose that the controverted question is of general importance.

POINT III.

"THE CIRCUIT COURT OF APPEALS ERRED IN DECLINING TO GIVE ANY WEIGHT TO THE SUPERIOR OPPORTUNITY OF THE TRIAL JUDGE OF OBSERVING THE WITNESS, AND PASSING ON THE WEIGHT OF THE EVIDENCE." (Petitioner's Brief, page 26).

(Petitioner's Assignment of Error No. 5 (Page 22):

"That the superior opportunity of the trial judge for reviewing the weight of the evidence is not to be recognized in reviewing the case on appeal"

does not appear in the decision of the Circuit Court of Appeals, either expressly or by implication (R. 93 to 98). Neither does it appear that the Circuit Court of Appeals *declined* to give any weight to the opportunity of the trial judge in observing the witnesses and the weight of the evidence.

Manifestly, upon an appeal from a directed verdict, the Circuit Court of Appeals must suppose itself in the same position as the trial judge when it passes upon his ruling. Unless this be so it must abdicate any review, except in

cases where the bare print leaves no doubt. The question before the Circuit Court of Appeals is the same as was before him; anything else makes his the final word.

Upon the trial of this case Respondent introduced evidence which, if believed by the jury, was sufficient to establish negligenec upon the part of the Petitioner:—The train was running late (R. 60); one block from where the accident occurred it was travelling between 40 and 50 miles an hour (R. 57); the bell was not ringing and the whistle was not blowing (R. 57, 59); the speed of the engine when it reached Scotland Street, according to one witness, was 35 to 40 miles an hour (R. 57); and two other witnesses placed the speed between 40 to 50 miles an hour (R. 59-60, 87-88). In addition to this it was established by uncontroverted testimony that the accident happened on one of the main thoroughfares of the City of Dunedin, at a populous section of the city, and that Scotland Street crossing was one that is constantly and habitually used by pedestrians and those travelling in conveyances of all kinds in crossing and recrossing the railroad tracks. That in approaching the railroad tracks in an easterly direction along Scotland Street, intervening objects prevent the view of an approaching train from the south until a person is "on the sidetrack" (R. 61, 86).

Respondent recognizes the right of the trial court to grant a new trial where he is of the opinion that the verdict is against the overwhelming weight or clearly against the great preponderance of the evidence, but the trial court cannot, for the same reason, direct a verdict for the defendant and thereby infringe upon the right of the plaintiff to have the case submitted to a jury.

If, as said by the Circuit Court of Appeals (R. 96), the injury and death of the children was "caused by the combined or concurrent negligence" of the Petitioner and the

father, the driver of the car (R. 96), then the Respondent was entitled to recover against the Petitioner although the father's negligence, concurring with that of the Petitioner, was the proximate cause of the injury. This is the well settled rule in Florida:

S. A. L. R. R. Co. v. *Watson,* 94 Fla. 571, 113 So. 716; *Covington* v. *S. A. L. R. R. Co.,* 99 Fla. 1102, 128 So. 426.

Conflict in the testimony as to the speed of the train and the failure to give warning of its approach should have been submitted to the jury. It was purely a question of fact to be determined by a jury and not by the trial court in peremptorily directing a verdict for Petitioner.

The trial court assumed the providence of the jury to pass upon conflicting testimony and the credibility of the witnesses (R. 90).

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them. *Railroad Company* v. *Stout,* 17 Wall. 657; *Washington & Georgetown Railroad* v. *McDade,* 135 U. S. 554; *Delaware & Lackawanna Railroad* v. *Converse,* 139 U. S. 469."
>
> *Richmond & Danville Railroad Co.* v. *Powers,* 149 U. S. 43, 45.

Conclusion.

The Respondent respectfully submits that the decision of the Circuit Court of Appeals is in accordance not only with local and federal law, but is a judgment not final, and the Petition shows no reason nor the importance of why an

immediate necessity for review by this Court should be granted.

Wherefore Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SARAH ELIZABETH STRINGFELLOW,
A Widow and as Administratrix, etc.,
By WM. C. MCLEAN,
By DOYLE CAMPBELL,
Attorneys for Respondent.